In recent years, the United States has seen a growing popularity with the use of electronic cigarettes and similar electronic nicotine delivery devices. Electronic cigarettes, or e-cigarettes, are battery-operated single-use or reusable devices with interchangeable cartridges that use a type of heating element to turn nicotine and other chemicals into a vapor inhaled by its user. The cartridges come in a variety of colors and flavors, like apple pie, cotton candy, mint chocolate, and tutti frutti, just to name a few. It is suggested that the array of flavors, combined with the relative ease of purchasing e-cigarettes and its components at mall kiosks and online, has made e-cigarettes particularly popular among youth.

According to the Centers for Disease Control and Prevention (CDC), more than 263,000 youth who had never smoked a tobacco cigarette used e-cigarettes in 2013, which is more than three times the number reported in 2011 (79,000). Following this trend, the 2014 Monitoring the Future survey, conducted by the National Institutes of Health, found that while daily tobacco cigarette use among adolescents continues to decline, an alarming number of adolescents have tried e-cigarettes. Of the more than 41,000 students in 8th, 10th, and 12th grades who were surveyed, 8.7 percent, 16.2 percent, and 17.1 percent, respectively, reported having tried e-cigarettes within the last 30 days. Between 4 percent and 7 percent of those students responded that they had never smoked a tobacco cigarette. Comparatively, only 1.4 percent, 3.2 percent, and 6.7 percent of the 8th, 10th, and 12th graders surveyed, respectively, reported having smoked a tobacco cigarette within the last 30 days; this is a decline of almost 50 percent from five years ago.

Recognizing the growing popularity of e-cigarettes and the potential dangers the uncertainty and misconceptions about them could pose, many states passed legislation in the last few years limiting the sale and use of e-cigarettes, rather than wait for future regulations from the U.S. Food and Drug Administration (FDA). A recent report by the CDC found that 40 states have enacted laws prohibiting the sale of electronic nicotine delivery systems, including e-cigarettes, to minors, while 10 states and the District of Columbia still permit the sale of these products to minors.

Unlike traditional cigarettes, e-cigarettes do not contain tobacco or produce the secondhand smoke that has been found to be particularly harmful to smokers and nonsmokers. Despite these differences, e-cigarettes do contain nicotine, which is the most addictive chemical in tobacco products. To date, there has been a lack of clinical scientific study on e-cigarettes, which leaves many questions about their potential risks, including the amounts of nicotine or chemicals that actually are being inhaled during use and whether e-cigarettes are a safe alternative to tobacco cigarettes. A preliminary analysis of various e-cigarette samples conducted by the FDA found the presence of some amount of harmful toxins, including some specific to tobacco, and inconsistent levels of nicotine, including those specifically labeled as containing no nicotine. While the FDA cautions that this analysis should not be used to draw conclusions about the health and safety of e-cigarettes, it does signal the need for further study on the issue.

More than half of the Southern Legislative Conference states provide a specific exclusion of cigarettes, tobacco products, and/or FDA-regulated drugs and devices from the definition of e-cigarette, alternative nicotine product, or vapor product. Likewise, some states exclude alternative nicotine products

Based on a reading of relevant state statutes, some interpretations could argue that fewer states have enacted such laws.
and vapor products from the definition of tobacco and tobacco products. In the absence of clear exclusions under both definitions, some argument could be made about the legal application of tobacco regulations to e-cigarettes. For example, if the definition of e-cigarette excludes cigarettes and other tobacco products, but the definition of tobacco or tobacco products remains silent on the exclusion or inclusion of e-cigarettes, do the statutes that mention only tobacco products apply to e-cigarettes not containing tobacco? This exception shows that the legislature recognizes a distinction between e-cigarettes and tobacco products, which could lead to interpretation that e-cigarettes not containing tobacco are not subject to provisions that specify only tobacco products. It is under this interpretation that the subsequent analysis proceeds.

This Regional Resource from The Council of State Governments’ Southern Office, the Southern Legislative Conference (SLC), examines the regulations proposed by the FDA and the actions taken by 14 of the 15 SLC member states with regard to e-cigarettes through the 2014 legislative session.†

**FDA PROPOSAL**

E-cigarettes, which were developed in China in 2004, entered the U.S. market in 2007. Between 2008 and 2010, the FDA regulated e-cigarettes as an unapproved drug-device combination product under the Federal Food, Drug, and Cosmetic Act (FD&C Act). In 2011, the FDA announced it would not appeal the U.S. Court of Appeals decision in *Soterra Inc. v. FDA*, 627 F. 3d 891 (D.C. Cir. 2010), which ruled that e-cigarettes can be regulated under the drug, device, or combination products provision only if they are marketed for therapeutic purposes, otherwise they only can be regulated as other products made or derived from tobacco under the 2009 federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act). Consequently, it was announced that the FDA would instead be developing a new strategy to regulate e-cigarettes as tobacco products. However, the FDA did not propose rules to assert this regulatory authority over e-cigarettes until April 2014.

The FD&C Act defines “tobacco product” as any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory or a tobacco product).¹ The Tobacco Control Act, which created the FDA Center for Tobacco Products, granted the FDA regulatory oversight of the manufacture, distribution, and marketing of tobacco products.² The Tobacco Control Act identifies regulatory authority for cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco, but also allows the FDA to promulgate rules extending this oversight to any other tobacco product that the Secretary of Health and Human Services “deems” by regulation to be subject to its provisions.³ Under its immediate authority, the FDA promulgated rules setting restrictions on the retail sale of cigarette and smokeless tobacco and the advertising and marketing of tobacco products toward youth.

In April 2014, the FDA released its long-awaited rule proposals deeming electronic cigarettes fall under the agency’s regulatory purview.⁴ Currently, the FDA Center for Drug Evaluation and Research provides regulation of e-cigarettes, but that authority extends only to those that are marketed for therapeutic purposes. The proposed rule would expand the definition of “tobacco products” to include e-cigarettes (including non-therapeutic), cigars,⁵ pipe tobacco, waterpipe (hookah) tobacco, novelty products like gels and dissolvables, and components and parts of tobacco products. Under the proposal, the rule also would deem any future products that meet the statutory definition of “tobacco products” as products that fall under the FDA’s regulatory powers. Included

Variety of e-liquid flavors. Photo courtesy of Lindsay Fox via Creative Commons license.

E-cigarette kit photo courtesy of TBEC Review via Creative Commons license.
among the components and parts proposed for regulation under the rules are flavorings used for the tobacco products and cartridges for e-cigarettes.

Upon finalization of the rule, the FDA would extend its current regulatory authority over cigarettes, roll-your-own tobacco, and smokeless tobacco to additional tobacco products “deemed” to fall under the Tobacco Control Act. Specifically, those powers include:

- Bringing enforcement action against products determined to be adulterated and misbranded;
- Requiring the submission of ingredient listings and the reporting of harmful and potentially harmful constituents for all tobacco products;
- Requiring registration and product listings for all tobacco products;
- Prohibiting the use of modified risk descriptors like “low,” “light,” and “mild” and other claims, unless the FDA has issued an order permitting their use;
- Prohibiting the distribution of free samples; and

The FDA is proposing three additional provisions that would apply to “covered tobacco products:” (1) a requirement for minimum age of purchase; (2) a prohibition on vending machine sales in facilities that permit persons under 18 to enter at any time; and (3) a requirement of health warnings for product packages and advertisements, which the FDA also is proposing to apply to cigarette tobacco and roll-your-own tobacco.

Following an extension of the original deadline, the comment period for the FDA's proposed e-cigarette rules closed on August 8, 2014. Final rules are expected to be published in mid-2015. The “deeming” provisions and age restrictions would become effective 30 days from the date the final rule is published. Requirements for health warnings would be effective 24 months after final publication, with an additional 30-day extension for existing domestic commerce inventory that does not have the required warning statements. Applicants seeking compliance for products introduced after February 15, 2007, would have 24 months following the effective date to submit applications for pre-market review. Likewise, the FDA will not initiate enforcement action against unapproved products on the market for 24 months after final rule publication, or until it has issued a response.

§New tobacco products that do not meet the requirements for classification as a “substantially equivalent” tobacco product or one of its exceptions must receive pre-market approval from the FDA prior to being marketed in the United States. A “substantially equivalent” tobacco product is one that has the same characteristics as a previously approved tobacco product or a product with different characteristics that does not raise different questions of public health.

To an application for approval that was submitted within the 24-month period.

**STATE ACTION ON E-CIGARETTES**

With the rapid growth in the use of e-cigarettes among minors and adults, many states took action to regulate these products rather than wait for FDA regulations to be finalized. Lending credence to these actions is the emergence of e-cigarettes in popular culture, as is evidenced by the Oxford Dictionary naming “vape” its 2014 word of the year.15

Much of the legislation enacted by SLC states included provisions defining e-cigarettes and related terms; establishing prohibitions and penalties for minors possessing e-cigarettes; establishing prohibitions and penalties for providing e-cigarettes; and placing restrictions on alternate methods of selling e-cigarettes. Provisions related to the taxation of e-cigarettes and its components, and restrictions on where e-cigarettes could be smoked, were some of the less common components of the states’ legislation. See Appendix A for the relevant code sections in each state.

**Defining E-Cigarette**

Much of the debate over regulating e-cigarettes centers on how to define “e-cigarette” and whether e-cigarettes are the same as tobacco products. In 2011, Tennessee became the first SLC state to pass legislation related to electronic cigarettes. House Bill 1729 (2011) amended the existing Prevention of Youth Access to Tobacco Act, which was enacted in 1994, to include limited application to e-cigarettes. This first SLC statutory regulation of e-cigarettes defines “electronic cigarette” as an electronic device that converts nicotine into a vapor that is inhaled by a user. Under the Act, a “tobacco product” is defined as any product that contains tobacco and is intended for human consumption, including, but not limited to, cigars, cigarettes, and bidis.

The debate over how to define e-cigarettes was especially robust in Missouri, where lawmakers twice voted to pass Senate Bill 841 in 2014, which excludes e-cigarettes from the definition of tobacco products, but also expressly prohibits alternative nicotine products, which includes e-cigarettes, from being otherwise taxed or regulated as tobacco products. Governor Jay Nixon vetoed the legislation because of the tax exclusion. Following a vote by the General Assembly to override the governor’s veto, the law went into effect in October 2014.

Similar to Missouri and Tennessee, 11 other SLC states had enacted new definitions to encompass e-cigarettes by the end of 2014. Alabama, Arkansas, Mississippi, and South Carolina have defined the term “electronic cigarette” or “e-cigarette” and include e-cigarettes in the definition of “alternative nicotine product.” Georgia, Kentucky, Louisiana, Missouri, Virginia, and West Virginia also have defined the
term “alternative nicotine product,” but that definition does not specifically include e-cigarettes. Instead, these six states and North Carolina have included e-cigarettes under the definition of “vapor product” or “nicotine vapor product.” In addition to e-cigarettes, these seven states include the cartridges and other containers of a nicotine solution that are intended for use with e-cigarettes in the definition of “vapor product.” Florida includes e-cigarettes and cartridges or containers under the definition of “nicotine dispensing device.” Generally, these terms define an e-cigarette as an electronic or noncombustible product or device that uses some type of heating element to produce a vapor from nicotine or other substances. It should be noted, however, that the definitions, as written, in Florida, Georgia, Missouri, North Carolina, Tennessee, Virginia, and West Virginia, only apply to vapor products, nicotine dispensing products, or e-cigarettes that have nicotine. Whereas, Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Oklahoma, and South Carolina have defined e-cigarettes or vapor products more broadly by including nicotine or other substances. As more is learned about e-cigarettes, this distinction could prove to be too narrow or too broad to effectively regulate these products.

North Carolina and West Virginia are the only SLC states that include vapor products or e-cigarettes in the definitions of tobacco product or tobacco-derived product, respectively. While the distinction in North Carolina is presumptively for taxation purposes, West Virginia does not currently tax e-cigarettes. Tennessee is the only SLC state that does not provide an exclusion for products regulated by the FDA as drugs and/or devices under the federal FD&C Act.

### Possession by a Minor

It is unlawful for a minor to purchase or attempt to purchase e-cigarettes in nine of the 14 SLC states that have enacted e-cigarette laws. Ten states have enacted statutes that make possession or attempted possession by a minor unlawful. Georgia, Kentucky, Louisiana, and Missouri provide an exception that allows a minor to possess e-cigarettes if they are obtained from a parent, guardian, or family member. It is not unlawful in Georgia for a minor to possess a vapor product, including an e-cigarette, if it is provided by

<table>
<thead>
<tr>
<th>State</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alabama</strong></td>
<td>alternative nicotine product, electronic cigarette, tobacco or tobacco products</td>
</tr>
<tr>
<td><strong>Arkansas</strong></td>
<td>alternative nicotine product, e-cigarette</td>
</tr>
<tr>
<td><strong>Florida</strong></td>
<td>nicotine dispensing device, nicotine product, tobacco products</td>
</tr>
<tr>
<td><strong>Georgia</strong></td>
<td>alternative nicotine product, cigarette, tobacco product, vapor product</td>
</tr>
<tr>
<td><strong>Kentucky</strong></td>
<td>alternative nicotine product, tobacco product, vapor product</td>
</tr>
<tr>
<td><strong>Louisiana</strong></td>
<td>alternative nicotine product, tobacco product, vapor product</td>
</tr>
<tr>
<td><strong>Mississippi</strong></td>
<td>alternative nicotine product, electronic cigarette</td>
</tr>
<tr>
<td><strong>Missouri</strong></td>
<td>alternative nicotine product, tobacco products, vapor product</td>
</tr>
<tr>
<td><strong>North Carolina</strong></td>
<td>consumable product, tobacco-derived product, vapor product, tobacco product</td>
</tr>
<tr>
<td><strong>Oklahoma</strong></td>
<td>tobacco product, vapor product</td>
</tr>
<tr>
<td><strong>South Carolina</strong></td>
<td>alternative nicotine product, electronic cigarette, tobacco product</td>
</tr>
<tr>
<td><strong>Tennessee</strong></td>
<td>electronic cigarette, tobacco product</td>
</tr>
<tr>
<td><strong>Virginia</strong></td>
<td>alternative nicotine product, nicotine vapor product, tobacco product</td>
</tr>
<tr>
<td><strong>West Virginia</strong></td>
<td>alternative nicotine product, tobacco product, vapor product</td>
</tr>
</tbody>
</table>

**Notes:**

- Terms in **bold** were defined or amended by the enacting legislation
- Definition includes electronic cigarettes
- Definition includes cartridges containing nicotine or other solution for use with e-cigarettes
- Definition includes alternative nicotine products
- Definition includes vapor products
- Definition excludes tobacco or tobacco products
- Definition excludes alternative nicotine products
- Definition excludes vapor products
- Definition excludes FDA-regulated drugs, devices, and/or combination products
a parent or guardian and possession is within the parent’s or guardian’s home while he or she is present. Similarly, in Louisiana, a minor may possess an alternative nicotine product if in a private residence or accompanied by a parent, spouse, or legal guardian who is at least 21 years old. Kentucky law permits minors to accept a vapor product, including an e-cigarette, if it is from a family member. Unlike Georgia and Louisiana, Kentucky does not confine the exception to private residences. In Missouri, the prohibition on distributing vapor products to a minor does not apply to family members on private property; however, there is no complementary language that permits a minor to possess vapor products under these circumstances. Georgia is the only state with an exception that also has complementary statutes to allow a minor to possess e-cigarettes provided by a parent or guardian and to allow a parent or guardian to provide e-cigarettes to a related minor. Alabama, Arkansas, Kentucky, Louisiana, Missouri, North Carolina, Oklahoma, South Carolina, and Virginia provide an exception for minors who possess e-cigarettes within the scope of their employment duties.

Mississippi and Tennessee are the only two SLC states with e-cigarette laws that do not include specific prohibitions on the possession or purchase of e-cigarettes by minors. While both states do have laws prohibiting the possession or purchase of tobacco products by a minor, based on a reading of the statutes, these provisions were not extended to include e-cigarettes.

**Punishment for a Minor**

The punishments for a minor who violates these laws range from confiscation and destruction of the product by law enforcement to paying a fine or completing court-ordered community service. Additional penalties include compulsory participation or attendance at a tobacco education or smoking cessation program or withholding, suspending, or revoking the minor’s driver’s license. Florida, Kentucky, Missouri, Oklahoma, Virginia, and West Virginia have graduated penalties for repeated violations. Alabama, Georgia, and South Carolina provide a maximum penalty for violation. Louisiana law provides separate penalties for a minor possessing e-cigarettes and a minor purchasing e-cigarettes. Each possession violation carries a fine up to $50, while a graduated penalty for purchase violations can range from $50 for the first violation up to $400 for the fourth and subsequent violations. Subsequent violations are only subject to graduated penalty if committed within 12 weeks of the initial violation in Florida, or within one year in Kentucky and Oklahoma. Florida, Georgia, Kentucky, South Carolina, Virginia, and West Virginia have provisions to allow for community service in conjunction with, or in lieu of, fines or other punishment. Community service options range from up to five hours in South Carolina to a maximum of 40 hours in Kentucky and Virginia for repeat offenses.

In Oklahoma, it is a misdemeanor for a minor found to be in possession of a vapor product to refuse to provide information on where and from whom the product was obtained if asked by a police officer, constable, juvenile court officer, truant officer, or teacher.

Under Florida law, the knowing possession of a nicotine product or nicotine dispensing device by a minor, or the misrepresentation of age or military service by a minor for the purpose of purchasing such products, is a noncriminal offense. The statute prescribes a fine of $25, in lieu of community service, for the first violation and a $25 fine for a second violation within 12 weeks of the first violation. Eighty percent of the civil penalties collected for such violations are directed to the Department of Education to provide teacher training and research and evaluation to reduce and prevent the use of tobacco products, nicotine products, or nicotine dispensing devices by children.

**Providing E-Cigarettes to a Minor**

Thirteen of the 14 SLC states that have enacted legislation to regulate e-cigarettes have placed specific restrictions, relative to minors, on the sale of e-cigarettes, vapor products, or alternative nicotine products. In each of these states, it is unlawful for a person, business, manufacturer, and/or retailer to give, barter, sell, furnish, deliver, purchase, and/or offer to do such things with regard to e-cigarettes to minors. Similar to the provisions set forth for minors in possession of e-cigarettes, providing e-cigarettes to a minor generally is considered a civil violation or low-level misdemeanor.

Florida, Georgia, North Carolina, Oklahoma, South Carolina, Tennessee, and West Virginia classify the violation of these provisions as a misdemeanor. Arkansas, Louisiana, Kentucky, Mississippi, Missouri, and Virginia specify that providing e-cigarettes to a minor is a violation or lesser offense.

**Fines and Penalties**

Laws in Louisiana, Mississippi, Missouri, Oklahoma, South Carolina, Tennessee, Virginia, and West Virginia provide for a graduated maximum or set fine for a first, second, third, fourth, and subsequent violation of their e-cigarette laws. The punishments for a first offense range from a written warning in Tennessee, to a $25 fine in Missouri, to a maximum of $200 in South Carolina. West Virginia has the largest range in fines with $50 for the first violation up to a maximum of $5,000 for a fourth or subsequent violation.

**The additional 20 percent remains with the clerk of the county court to cover administrative costs.**

**†† Alabama law prohibits the selling, bartering, exchanging, or giving to minors cigarettes, cigarette tobacco, cigarette paper, or any substitute for such things. However, based on a reading of the statutes, no amendment to the existing law incorporates e-cigarettes or alternative nicotine products into this prohibition.**
Four states limit the graduated penalties for repeat offenses if the subsequent offense occurs within a specific time after the first. Oklahoma and West Virginia limit subsequent offenses to two years, South Carolina limits them to three years, and Tennessee has the longest specified period of five years.

Additional Penalties for Retail Owners

In addition to the graduated penalties, Oklahoma law allows for the suspension of a store’s license to sell tobacco products or its sales tax permit for up to 30 days or 60 days for third

Table 2

<table>
<thead>
<tr>
<th>State</th>
<th>Cigarette Tax (per pack of 20)</th>
<th>Rank (50+DC)</th>
<th>Other Tobacco Tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>$0.425</td>
<td>47</td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td>$1.15</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>$1.339</td>
<td>27</td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>$0.37</td>
<td>48</td>
<td></td>
</tr>
<tr>
<td>Kentucky</td>
<td>$0.60</td>
<td>40</td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td>$0.36</td>
<td>49</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>$0.68</td>
<td>37</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>$0.17</td>
<td>51</td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>$0.45</td>
<td>45</td>
<td></td>
</tr>
<tr>
<td>Oklahoma²</td>
<td>$1.03</td>
<td>31</td>
<td></td>
</tr>
<tr>
<td>South Carolina</td>
<td>$0.57</td>
<td>42</td>
<td></td>
</tr>
<tr>
<td>Tennessee</td>
<td>$0.62</td>
<td>39</td>
<td></td>
</tr>
<tr>
<td>Texas</td>
<td>$1.41</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>$0.30</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>$0.55</td>
<td>44</td>
<td></td>
</tr>
</tbody>
</table>

Notes:
1 Little cigars are defined as cigars weighing three pounds or less per thousand.
2 Oklahoma does not collect state sales tax on cigarettes as approved by a 2004 referendum.
E-Cigarettes in the SLC States

E-cigarettes on the Internet or through the mail. Arkansas, Mississippi, North Carolina, and South Carolina require the

Alternate Methods for the Sale of E-Cigarettes

Six SLC states have specific provisions related to the sale of e-cigarettes on the Internet or through the mail. Arkansas, Mississippi, North Carolina, and South Carolina require the

STATE TAXATION OF E-CIGARETTES

Some of the lowest taxes on tobacco in the country are in SLC states. On January 1, 2015, the average excise tax on cigarettes among the 50 states and the District of Columbia was $1.54 per pack. The average tobacco tax in the 15 SLC member states was $0.668. Among the SLC states, Texas has the highest tobacco tax at $1.41 per pack, which ranks 25th in the nation. Missouri, Virginia, Louisiana, Georgia, and Alabama have the lowest tobacco tax rates in the nation. Comparatively, the federal cigarette tax is $1.01 per pack.

With the enactment of SB 841 (2014), Missouri became the first state to prohibit excising and regulating e-cigarettes, and other alternative nicotine or vapor products, as tobacco products. This prohibition leaves e-cigarettes subject only to state and local sales tax. Despite being the only state to expressly prohibit taxing e-cigarettes in the same manner as tobacco cigarettes, Missouri is not alone in the practice. In 2014, across the nation, 16 states, including Kentucky, North Carolina, Oklahoma, and South Carolina, considered bills to tax e-cigarettes in addition to taxes levied as state and local sales tax; as of December 2014, only Minnesota and North Carolina had adopted such legislation.

Beyond the decision in these states to impose additional taxes on e-cigarettes, there remains a significant divide between the rates at which the products are taxed. Minnesota, which in 2013 became the first state to enact a tax on e-cigarettes, levies a variable 95 percent tax on the wholesale price of e-cigarettes and e-juice containing nicotine. By comparison, Minnesota imposes a fixed tax of $2.83 per pack on traditional cigarettes. Beginning June 1, 2015, North Carolina will levy an excise tax of 5 cents per milliliter.
Figure 1

Net Cigarette Tax Revenue (thousands): FY 2009 - FY 2013

Note: Striped bars indicate a fiscal year in which a state increased the tax rate on cigarettes, some of which took effect during the July 1-June 30 fiscal year.

Note: Net revenue collections in Florida (2010-2013) and Texas (2009-2013) exceed $1 billion, but have, similarly, experienced declines during the years depicted.

ter of consumable product.\textsuperscript{11} Comparatively, North Carolina levies a tax of 45 cents per pack on traditional cigarettes and a variable 12.8 percent on the cost of other tobacco products.\textsuperscript{20} Using industry data, the Fiscal Research Division of the North Carolina General Assembly estimated that the 5-cent-per-milliliter tax would generate about $5.1 million in general fund revenue each fiscal year.\textsuperscript{21}

In Kentucky, the Department of Agriculture is charged with educating the public and sellers of tobacco products on the legal provisions and penalties for the sale and distribution of tobacco products. To offset the cost of these educational efforts, the Department is entitled to one-twentieth of one cent ($0.0005) from the three-cent ($0.03) state excise tax collected on each pack of cigarettes, and half of any fines collected under the sale and distribution laws. In 2014, this duty also was expanded to require educating sellers of alternative nicotine products and vapor products; however, no excise tax will be levied on these products to provide additional funding to execute this responsibility.

**SMOKE FREE LAWS & RESTRICTIONS ON SMOKING E-CIGARETTES**

As of November 30, 2014, the CDC found that 27 states and the District of Columbia have comprehensive smoke-free laws, but only three of those states (New Jersey, North Dakota, and Utah) extend this prohibition to electronic nicotine delivery systems, which include e-cigarettes. Although no SLC states qualify as smoke-free under the CDC’s definition of a comprehensive smoke-free law, which prohibits smoking in restaurants, private worksites, and bars, a number of SLC states do place some restrictions on where e-cigarettes can be smoked.\textsuperscript{13} Some examples of these restrictions include, but are not limited to, laws in Arkansas, Oklahoma, and West Virginia that prohibit the use of e-cigarettes on school property and laws in North Carolina and Oklahoma that prohibit their possession in state correctional facilities.

In 2014, Virginia enacted legislation directing each school board to include in its student code of conduct provisions prohibiting the possession of electronic cigarettes on a school bus, school property, or at school-sponsored activities.

**CONCLUSION**

The quandary faced by state policymakers regarding the treatment of e-cigarettes is multifaceted, whether related to the possible health impacts and potential subsequent costs; implementing regulations on access and use by minors; or determining whether they could provide a viable revenue stream, among other things. Considerations regarding the treatment of e-cigarettes in the broader policy domain could be reminiscent of the dynamics surrounding the 1998 Tobacco Master Settlement Agreement (MSA), when 46 states\textsuperscript{4} and the District of Columbia reached an agreement with the country’s four largest tobacco companies to settle lawsuits seeking the recovery of billions of dollars in costs associated with treating tobacco-related illnesses. Under the MSA, the tobacco companies agreed to pay the states approximately $200 billion in payments over 25 years.

The MSA and the realizations leading up to it followed many years of consumers citing a lack of information, or access to information, about the health risks tobacco cigarettes pose. The science and technology available today make it easier to ascertain the potential health risks associated with e-cigarettes and other alternative nicotine or vapor products, and to compare those risks with the risks posed by traditional tobacco products. Coupled with the ability to disseminate findings to the public almost as soon as they become available, these advancements provide policymakers with more reliable and timely information on which to base discussions when considering regulations pertaining to e-cigarettes.

If e-cigarettes are found to be a safer alternative to tobacco cigarettes or to be an effective cessation tool, states might wish to consider how to encourage their use by existing smokers. However, if these devices are found to pose the same or greater risks as traditional tobacco, states might focus on limiting their availability and use, particularly among youth. Contingent upon conclusive scientific findings, early action against the harm that could be caused by e-cigarettes could go a long way toward avoiding the widespread health epidemic that led to the MSA for tobacco use. Beyond avoiding costly legal action, the outcome could be a healthier populace with reduced healthcare costs for the states.

With the impending depletion of MSA payouts on the horizon and a decline in the number of Americans who use tobacco products, replacing this revenue could pose a challenge. Coupled with falling tobacco revenues, states already are struggling to keep pace with education and Medicaid growth, while trying to address current and future transportation infrastructure and repairs, which no longer can rely on motor fuel revenue and the Highway Trust Fund as a steady source of funding.

Regardless of health implications, discussions among policymakers pertaining to taxation issues will be vigorous, while the quest to remain “tax neutral” may not prove to be a sustainable approach. The legislative approach to taxing the consumables of e-cigarettes closely parallels that of an excise tax on tobacco and motor fuel, which applies only to users of the product without increasing taxes across the§§Florida, Minnesota, Mississippi, and Texas each settled their cases separately and were not parties to the 1998 Tobacco Master Settlement Agreement.

\textsuperscript{11} Consumable product is defined as any nicotine liquid solution or other material containing nicotine that is depleted as a vapor product is used.
board. Although likely not a substantial source of revenue, the expected growth of the e-cigarette market would have a positive impact on this revenue stream.

As states continue to monitor trends in the use of e-cigarettes, alongside the science, there are a number of factors lawmakers may wish to consider when crafting potential regulations, including, but not limited to, providing clear and concise definitions for e-cigarettes and tobacco products; establishing clear restrictions on the sale and use of e-cigarettes; enforcing restrictions on the sale and use of e-cigarettes; implementing procedures for the recycling or disposal of e-cigarettes and related products; including e-cigarettes in smoke-free laws; taxing e-cigarettes or its consumables and at what rate; and allowing local ordinances to provide further restrictions on e-cigarettes beyond state law. These and other issues related to e-cigarettes are likely to remain part of the legislative discussion for the foreseeable future.

### Appendix A

<table>
<thead>
<tr>
<th>Law</th>
<th>Relevant Statutes</th>
<th>Enacting Legislation</th>
</tr>
</thead>
</table>

Note: The Texas Legislature did not meet in 2014; however, legislation currently is being considered during the 2015 session.

Disclaimer: Product depictions do not constitute an endorsement by The Council of State Governments or the Southern Legislative Conference of the brands or products depicted.
Glossary

- **atomizer** – a metal component on an e-cigarette that uses heat to vaporize the e-juice or other liquid substance; can be combined with a cartridge to form a cartomizer
- **alternative nicotine product** – a noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means
- **bidi** – thin, hand-rolled cigarettes with tobacco rolled in a tendu or temburni leaf; primarily imported to the United States from India and other Southeast Asian countries
- **cartridge** – a plastic tube-like reservoir with an absorbent filler material that holds e-juice; can be combined with an atomizer to form a cartomizer
- **covered tobacco products** – term proposed to encompass any tobacco product deemed to be subject to FDA regulation under the Food, Drug, and Cosmetic Act
- **drug-device combination product** – therapeutic and diagnostic products regulated by the FDA that combine drugs, devices, and/or biological products
- **e-juice** – the liquid substance, which usually contains nicotine and flavoring, that is vaporized when using an e-cigarette
- **electronic cigarette** – an electronic product or device that produces a vapor that delivers nicotine or other substances when inhaled from the device to simulate smoking, and is likely to be offered to or purchased by consumers as an electronic cigarette, electronic cigar, electronic cigarillo, or electronic pipe
- **roll-your-own tobacco** – any tobacco product which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes (FD&C Act)
- **smokeless tobacco** – any tobacco product that consists of cut, ground, powered, or leaf tobacco and that is intended to be placed in the oral or nasal cavity (FD&C Act)
- **tobacco product** – any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product); does not include a product that has been classified as a drug, device, or drug-device combination (FD&C Act)
- **vape** – to inhale and exhale the vapor produced by an electronic cigarette or similar device (Oxford English Dictionary)
- **vapor product** – a noncombustible product that employs a heating element, battery, power source, electronic circuit, or other electronic chemical or mechanical means, that can be used to produce vapor from nicotine in a solution or other form

Endnotes

4 Ibid.
This report was prepared by Policy Analyst Lauren Greer for the Human Services and Public Safety Committee of the Southern Legislative Conference (SLC) of The Council of State Governments (CSG) under the chairmanship of Representative Joni Jenkins of Kentucky. This report reflects the body of policy research made available to appointed and elected officials by the Southern Office.

The Southern Office of The Council of State Governments, located in Atlanta, Georgia, fosters and encourages intergovernmental cooperation among its 15 member states. In large measure, this is achieved through the ongoing work of the standing committees of its Southern Legislative Conference and supporting groups. Through member outreach in state capitolis, policy research, international member delegations, staff exchange programs, meetings and fly-ins, staff support state policymakers and legislative staff in their work to build a stronger region.

Founded in 1947, the SLC is a member-driven organization and the largest of four regional legislative groups operating under CSG and comprises the states of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia.

The SLC’s six standing committees provide a forum which allows policymakers to share knowledge in their area of expertise with colleagues from across the South. By working together within the SLC and participating on its committees, Southern state legislative leaders are able to speak in a distinctive, unified voice while addressing issues that affect their states and the entire region.